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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY and the ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers,

Petitioners,

v.

JAMES C. PLEDGER,
COMMISSIONER OF REVENUES, *et al.*,

Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,

Intervenor.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF AMICUS CURIAE OF NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The National Cable Television Association, Inc. ("NCTA"), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50

million cable television subscribers. This case requires the Court to address the constitutionality of a taxation system that places special burdens on cable television. This issue is of great concern to the NCTA and its members.

SUMMARY OF ARGUMENT

When a state imposes taxes that favor one medium of communications over another, it raises problems at the heart of the First Amendment. The court below acknowledged as much, in holding that cable television services could not constitutionally be burdened with higher taxes than satellite television services. The court erred, however, by failing to give full application to the general requirement that a state not discriminate against a particular communications medium without a strong justification.

It is now beyond dispute that cable television engages in activities protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). In providing a wide variety of information and entertainment programs, it performs a function essentially indistinguishable from that of such traditional media as newspapers and magazines. Like the editor of a publication, a cable operator must determine what material to offer on its service. To carry out that function, a cable operator not only selects from scores of cable program services, but it offers original programming as well, including programming concerning events of purely local interest. Well over half of Americans with televisions now rely on cable, and the audience for programming provided exclusively on cable now rivals that for broadcast programming. As a consequence, cable operators vie with the older media for advertising dollars and viewers. In short, cable plays a major role in the contemporary marketplace for speech.

This Court has several times recognized that singling out members of the media for special tax burdens raises

serious constitutional concerns. *See, e.g., Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Rooted in the Framers' concern with the "taxes on knowledge" that burdened the English and colonial press, the constitutional presumption against discriminatory press taxes rests in part on the likelihood of an underlying censorial motive, but the direct effect of such taxes—selective inhibition of free speech—is such as to warrant strict scrutiny even in the absence of such a motive. *Minneapolis Star*, 460 U.S. at 585. Although *Arkansas Writers' Project* involved content discrimination, and *Minneapolis Star* involved a tax that applied only to the press, the principles of those decisions extend beyond cases in which the state singles out for special burdens the press as a whole or a select group within a particular branch of the press. The same First Amendment concerns demand, at a minimum, that a state have a strong justification whenever it treats a particular medium of communications differently from others. Such tax treatment might reflect hostility to protected speech that is characteristic of that medium. More generally, by creating classes of favored and disfavored media, the state may diminish the vigor and independence not only of the disfavored class, but also of the favored one, since the former group stands as an example to the latter.

In view of these considerations, the State here must show a strong, if not a compelling, interest to justify its sales tax, which discriminates both between cable and other service businesses and between cable and other communications media. There is no such interest in this case. Although cable television is distinguishable in some ways from other media, its distinguishing characteristics have no relationship to the differential tax burdens here at issue. The Arkansas tax therefore violates the First Amendment.

ARGUMENT

Because of the relative youth of cable television as a medium of expression, this Court has had little occasion to address directly its place in the marketplace for speech.[1] The State of Arkansas, by subjecting cable to differential taxation and arguing that it is not comparable to more traditional communications media, has brought into focus one particular aspect of the question whether this new medium is entitled to the full protections of the First Amendment. To address this question, we first discuss the nature of cable television and its similarities to traditional media, as well as the possible significance of the differences between it and other media. We then examine the strict standard to be applied to taxes that discriminate against and among media, and the history and policies that undergird that standard. Finally, we discuss the insubstantiality of the State's possible justifications for its discriminatory tax.

I. CABLE TELEVISION ENGAGES IN COMMUNICATIONS ACTIVITIES THAT ARE FULLY PROTECTED BY THE FIRST AMENDMENT

The core activities of cable television—that is, providing news, information, and entertainment to its subscribers—"plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). At the same time, the existence of First Amendment protections for cable speech

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[1] Some of the Court's earlier discussions of cable television are now outdated as a result of changes in the cable industry. *See, e.g., Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) ("Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals . . . ."); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163 (1968) (viewing "principal function" of cable systems as "the importation of distant [broadcast] signals"). Because of the proliferation of cable channels, including both national services and locally originated programs, such descriptions are not accurate today. *See* Part I(A), *infra*.

"does not end the inquiry" regarding the validity of a particular regulatory burden. *Id.* at 495. Especially in view of the State's unexplained contention that cable television "is of a character completely dissimilar to the press," No. 90-38 Br. in Opp. 8, an examination of the nature of cable is a useful starting point for an inquiry into the validity of the tax at issue here. *See also Preferred*, 476 U.S. at 496 (Blackmun, J., concurring) (noting lack of "information about the nature of cable television").

A. With Respect to Its Activities in the Marketplace for Speech, Cable Television Is Like Any Other Medium of Mass Communication

"[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary"; these principles "make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). In general, the First Amendment protects without differentiation every method of communication that serves as "a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Thus the Constitution treats pamphlets and leaflets with the same concern as newspapers and magazines. *Ibid. See also Mills v. Alabama*, 384 U.S. 214, 219 (1966). This evenhanded approach is justified by the fact that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The basic protections of the First Amendment therefore extend to the speech activities characteristic of cable television.

While cable television, as a separate "medium," is unique in terms of its technology, as a participant in the marketplace for speech it engages in activities in many ways indistinguishable from those of such traditional communications media as newspapers and magazines. *See Preferred*, 476 U.S. at 494. Cable system

operators in Arkansas seek to provide programming that covers "a wide variety of topics and formats, including regular news and entertainment programming," as the trial court below found. Pet. App. 14a.[2] The same is true of cable operators across the country. As a provider of information and entertainment, cable functions much like a traditional general interest publication.

Like the editors of a daily newspaper or general interest magazine, cable operators "exercise 'a significant amount of editorial discretion regarding what their programming will include.'" *Preferred*, 476 U.S. at 494 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)). Roughly 90 percent of all cable subscribers are served by cable systems offering 30 or more different channels. Federal Communications Commission, Report, MM Docket No. 89-600, at 5 (July 1990) (hereinafter "*FCC Report*"). Cable operators fill these channels with programming from a wide variety of potential sources, including not only local and distant broadcast stations, but also dozens of program services produced specifically for cable television. *See* Nat'l Tel. & Inf. Admin., U.S. Dep't of Commerce, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* at 8 (June 1988) (hereinafter "*NTIA Report*"). Editorial choices made by cable operators regarding these sources are unavoidable, because not all the sources can be carried on a typical cable system. *See id.* at i.[3] *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (scarcity necessitates editorial decision making).

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in the present case.

[3] Indeed, in the last few years, the importance of the editorial role of cable operators has been increasing. "Cable has shifted from its early role as a broadcast antenna service focused on facilities, to an original programming service . . . ." *NTIA Report* at i.

For example, in addition to area broadcast stations, more than forty-six different cable channels are carried by the various cable systems serving the Baltimore-Washington, D.C. area. *See* Washington Post, TV Week, Nov. 4, 1990 at 47.[4] These channels, like the sections of a daily newspaper, cover a wide variety of subjects, including news (such as Cable News Network, CNBC (Consumer News and Business Channel), Associated Press, and Financial News Network), weather (Radar Weather, Weather Channel), public affairs (C-SPAN, C-SPAN II, Local Government), sports (ESPN, Home Team Sports, Sports Tracker), children's programming (Disney Channel, Nickelodeon), education and travel (Learning Channel, Discovery, Travel Channel), women and minorities (Lifetime, Black Entertainment Television Network, Univision (Spanish language)), shopping (QVC), and religion (Inspirational Network, Trinity Broadcasting Network), as well as many channels devoted to movies (American Movie Classics, Cinemax, The Movie Channel, Showtime), the performing arts (Bravo, Arts & Entertainment), various types of popular music (MTV, Country Music Television, Video Hits-1), and other entertainment (HBO, The Family Channel). *Ibid.* The list of available program sources is constantly expanding. *See NTIA Report* at 11 (charting rise in number of cable networks up to 1987, when there were a total of 65).

Moreover, like newspapers and magazines, cable operators produce and distribute original material, including material of specifically local interest. *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 403-04 & n.8 (1974). *Cf. FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (former local origination rule involved activities "comparable to [those of] television broadcasters"). Indeed, for some time cable has offered local programming with a level of imme-

[4] The prospectuses of these cable systems reveal that they offer a number of stations not listed in the Washington Post.

diacy and detail that the traditional media do not match. *See* "Cable News Hits the Small Time," *Columbia Journalism Review* at 35 (Sept./Oct. 1982). For example, the trial court below, in describing some of the local programming distributed by Arkansas cable operators, found that the operators offered not only "a variety of entertainment programming" but such programs as "agricultural service reports, policy commentary on the State Legislature's activities, industrial incentive programming and educational training," as well as coverage of "City Council and school board meetings, [and] the local high school football games." Pet. App. 14a.

The Arkansas programming is by no means unique. The amount of local news provided by cable operators is rapidly increasing nationwide. "Cable Does Local News," *Cable tv Business* at 27 (Sept. 15, 1990). A leading example is News 12 Long Island, a 24-hour cable news channel specializing in local news, which is produced by a Long Island cable system and received by 535,000 homes. *See* Newsday, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. The success of News 12 has inspired a new 24-hour news channel on cable television in Orange County, California, and all-news channels are being planned in New England, New Jersey, Westchester County, New York, and Fairfield County, Connecticut. N.Y. Times, April 16, 1990, at 33; Electronic Media, Nov. 5, 1990, at 1. Moreover, dozens of cable operators insert local news in Turner Broadcasting's Local Edition, a local news segment on CNN Headline News. "Cable Does Local News," *Cable tv Business* at 29.

The "numerous new programming services and original programs" offered by cable have resulted in "substantially greater viewing choices to the American public." *FCC Report* at 5. The significance of this development is underscored by reference to the size of the audience that cable serves—an estimated 54,235,200 house-

holds, or 58.9 percent of all households with television. National Cable Television Association, *Cable Television Developments* at 1-A (Oct. 1990) (hereinafter "*NCTA Report*").[5] And cable service is now *available* to "about 90 percent of Americans." *FCC Report* at 5.

A further indication of the close parallels, for First Amendment purposes, between cable television and more traditional media is the actual competition between cable and other media. The most obvious competition, both for viewers and advertisers, is between cable and broadcast television. This competition is not of recent origin; the now-defunct "must carry" regulations that required cable systems to carry local broadcast stations were based largely on the policy of protecting broadcast television. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 175-77 (1968); *Century Communications Corp. v. FCC*, 835 F.2d 292, 293-94 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439, 1441 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In recent years, cable has made significant gains; "overall audience ratings for basic cable programming services have doubled since 1984, now exceeding, on average, the total all-day audience share of any major television network affiliate." *FCC Report* at 6. Advertisers are attracted to cable not only by successful programming, but also by the fact that cable systems allow some local advertisers to reach potential customers in their areas more economically than does broadcast television. *See* Newsday, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. *See also* Paul Kagan Associates, Cable TV Advertising at 1 (April 26, 1990) (estimating value of advertising sold by local cable operators in 1989 at $496 million).

There is also significant competition between cable and other media, such as newspapers. *See* N.Y. Times, May

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[5] This estimate was derived from data from the A.C. Nielson Company for July 1990. Other sources suggest percentages of cable households at 56 percent and 58.1 percent. *NCTA Report* at 1-A.

27, 1990, § 12LI, at 3, col. 1 ("Cablevision and Newsday are on the verge of a media war."). Quite apart from the more general competition between newspapers and cable as alternative sources of entertainment and information, the expansion by cable systems of their local news coverage exerts pressure on local newspapers that is likely to "change the way the local paper covers the area." "Cable Does Local News," *Cable tv Business* at 28 (quoting source).[6] The potential for newspaper-cable competition is reflected in the fact that local newspapers have seen fit to cooperate with some cable operators in the offering of local news programs. *Id.* at 28-29. *See also* N.Y. Times, April 16, 1990, at 33 (new all-news cable channel in Orange County, California, "intensifies the competition between Freedom Newspapers Inc. [owner of the cable channel] and the Times Mirror Company"). *Cf. Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper attempted to eliminate competition for advertising from radio broadcaster).

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). In view of the breadth and volume of speech offered by cable television, it is clear that cable is now one of the "diverse and antagonistic sources" that contributes to the First Amendment marketplace. Cable is, of course, comparable in certain respects to subscription satellite

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[6] A recent national poll indicated that significantly more people rely on television as their primary source of news than rely on newspapers. Times Mirror Center for the People and the Press, *The American Media: Who Reads, Who Watches, Who Listens, Who Cares* (July 15, 1990) (based on three separate sets of interviews in early 1990, each with more than 1200 persons, 20 percent more people regularly watch news on television than regularly read a daily newspaper). This same poll found that 52 percent of the subjects at least sometimes watch CNN (Cable News Network). *Id.* at 40.

television, as the Arkansas Supreme Court found, but for constitutional purposes it also bears comparison to established media, including newspapers and magazines. As a young and robust competitor in the marketplace for speech, cable television is entitled to full constitutional protection for its speech activities.

B. The Force of the First Amendment Protections Covering Cable Television Is Not Diminished by the Fact That Cable Is Distinguishable From Other Communications Media

Despite the similarities between cable television and other communications media, it is of course true that cable —which delivers programming through cables frequently using public rights-of-way—is not identical to any other medium. This lack of identity, however, proves only that cable is a medium distinguishable from other media, just as newspapers are distinct from magazines and radio from broadcast television; it does not by itself suggest limitations on First Amendment protections. At the same time, while "the basic principles of freedom of speech and the press . . . do not vary," each medium of communication "tends to present its own peculiar problems." *Joseph Burstyn, Inc.*, 343 U.S. at 503. And the analysis of justifications for regulatory responses to such peculiar problems is sometimes referred to in terms of "differences in the First Amendment standards" to be applied. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

Because the State has argued that cable television's distinctive identity is sufficient to lessen its First Amendment protections, it is important to be clear about what "differences in . . . First Amendment standards" does and does not mean in the present context. The constitutionality of a particular regulation must always be eval-

uated with reference to the "peculiar problem" addressed by the regulation. Put another way, for a "difference" in regulation among media to be legitimate, it must be based upon a relevant "difference" among the media themselves. Thus, for example, it is perfectly appropriate for a state to respond to the peculiar problems of sound trucks by restricting their noise levels. *Red Lion*, 395 U.S. at 387 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). This does not mean, however, that merely pointing out the essential nature of sound trucks would be sufficient to justify any and all regulation. Only measures specifically tied to the peculiar problems presented by sound trucks are justified by reference to the uniqueness of that medium.

Similarly, this Court has held that the peculiar problems of broadcasting justify regulations that would raise serious constitutional difficulties if applied to other media. Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate," governmental allocation of frequencies is necessary to protect and further effective communication. *Red Lion*, 395 U.S. at 388. The Court in *Red Lion* held that this scarcity of frequencies supported the FCC's fairness doctrine. At the same time, however, the Court indicated that the scarcity rationale could not justify regulations with no logical connection to it, such as censorship of programs or requirements that discriminate among licensees. *Id.* at 396. *See also FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating ban on political editorials by public broadcasting stations, after close scrutiny of government's proposed justifications).[7]

In short, the fact that one medium is different from another does not mean that, with regard to any particular regulation, it is entitled to a different (or lesser) degree of First Amendment protection. It is obviously

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[7] In *League of Women Voters*, 468 U.S. at 376 n.11, the Court took note of the possible obsolescence of the scarcity rationale, but declined to reconsider the rationale at that time.

possible to distinguish between outdoor and indoor movie theatres, between live theatrical productions and movies, between cable and newspapers—in fact, between any one medium of communication protected by the First Amendment and any other. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Southeastern Promotions*, 420 U.S. at 557-58; *Joseph Burstyn, Inc.*, 343 U.S. at 503. For First Amendment purposes, however, distinctions between media are irrelevant, unless the distinguishing characteristics of a burdened medium have a logical nexus with a challenged regulation.[8] The special characteristics of cable do not justify burdening it with taxes not imposed on other communications media, as explained in Parts II and III below.

II. TAXATION THAT DIFFERENTIALLY BURDENS COMMUNICATIONS MEDIA VIOLATES THE FIRST AMENDMENT UNLESS JUSTIFIED BY A STRONG GOVERNMENTAL INTEREST

A. Discriminatory taxation of the communications media raises concerns at the core of the First Amendment. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). While it is well accepted that a mass communications business is subject to a generally applicable tax (that is, a tax that treats it like any other business), a tax that discriminates against communications media is "presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585. The state attempting to impose such a tax bears a "heavy burden": it must demonstrate that the regulation serves a

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[8] For that reason, of course, the justifications for each type of regulation must be looked at separately. For instance, a state cannot claim that the reasons given for regulating the number of cable operators in a given area—the issue in *Preferred*—suffice to support discriminatory taxation, or vice-versa. Each regulation must stand or fall on its own merits.

strong, if not compelling, governmental interest that cannot be achieved without differential taxation. *See Arkansas Writers' Project*, 481 U.S. at 231; *Minneapolis Star*, 460 U.S. at 582, 585, 592-93.

This requirement stands in sharp contrast to the lenient reasonableness standard that ordinarily applies, absent First Amendment concerns, to challenges to taxes based on principles of equal protection. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343-44 (1989); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973). In general, states are free to tax more heavily those activities that they wish to discourage. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974). Taxes that discourage specific First Amendment activities, however, raise quite different problems—problems that this Court has found, based on both history and policy, to merit intense scrutiny.[9]

The "taxes on knowledge" imposed by the British government in the Eighteenth Century were a much-hated

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[9] Discriminatory taxes on the media also raise problems quite different from the type of problems that this Court has analyzed under the test of *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* framework was designed for analysis of regulations (not taxes) that are directed at conduct, but have an incidental impact on speech. Discriminatory taxes, however, are not properly regarded as incidental regulations of speech, because they discriminate against speakers as such, not incidentally. *See Minneapolis Star*, 460 U.S. at 585. Because of these problems, close scrutiny for such taxes is warranted. Thus, although the trial court below purported to apply the balancing approach of *O'Brien*, the Arkansas Supreme Court, to the extent it perceived facial discrimination, applied a more demanding standard.

Even if the Court were to find the balancing approach of *O'Brien* applicable to the problem here, however, the approach should be applied with more than usual rigor, because of the special dangers presented by discriminatory taxation. Under this approach, the result in this case would be the same as under the strict scrutiny of *Minneapolis Star*, since the discriminatory sales tax at issue is not tailored to further a substantial governmental interest.

"form of previous restraint upon printed publications" that curtailed circulation of inexpensive publications aimed at mass audiences. *Grosjean*, 297 U.S. at 246, 249. The Framers of the First Amendment were well aware of the struggles both here and in England against these press taxes; indeed, as every schoolchild learns, the British government's taxation of the colonial press was one of the precipitating events of the American Revolution. *See id.* at 246. Although there is no doubt that "freedom of the press" covers direct prior censorship, there is also no doubt that it is not limited to such censorship, which in fact had disappeared from English practice well before the Revolution. *See id.* at 246, 248. *See generally Near v. Minnesota*, 283 U.S. 697, 714-15 (1931). In view of this historical context, "[i]t is . . . impossible to believe that [the First Amendment] was not intended to bring within the reach of these words such modes of restraint as were embodied in [special taxes on the press]." *Grosjean*, 297 U.S. at 248. *See also Minneapolis Star*, 460 U.S. at 583 (noting "substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment").

This Court has treated discriminatory taxes on communications media as "presumptively unconstitutional" because such taxes raise many of the same problems as direct censorship. First, experience has shown that the simple fact of "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression." *Minneapolis Star*, 460 U.S. at 585. This justifiable suspicion of censorial motive, together with the Court's general caution about inquiries into legislative motive in particular cases (*see United States v. O'Brien*, 391 U.S. 367, 383 (1968)), has warranted a strong prophylactic rule against discriminatory taxes, a rule that generally condemns such discrimination without any need to demonstrate censorial motive on the part of the legislature. *See Arkansas Writers' Project*, 481

U.S. at 228; *Minneapolis Star*, 460 U.S. at 580, 592 ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

Second, even aside from historically well-founded suspicions about legislative motive, the constitutional presumption against discriminatory taxes on the press is justified by the effect that such taxes have on the communications media and, by extension, on the American democratic system. Special taxation of a communications medium "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Minneapolis Star*, 460 U.S. at 585. Without a prophylactic rule, the ever-present threat of differential taxation at the hands of (potentially hostile) legislators would have a strong tendency to affect the content of communications: that threat would "dampen the vigor and limit the variety of public debate" as media look over their shoulders at the taxing authorities and seek to obtain or retain favored tax treatment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)); *Minneapolis Star*, 460 U.S. at 585. Thus, like censorship, discriminatory press taxes ultimately undermine the function of the press in producing the "informed public [that] is the essence of working democracy." *Minneapolis Star*, 460 U.S. at 585. *See also Mills v. Alabama*, 384 U.S. at 219 (discusssing dangers of censorship with respect to the "constitutionally chosen" role of the press in preventing "abuses of power by governmental officials").

B. In *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*, the Court, having expressed these First Amendment concerns, established a requirement of strict judicial scrutiny demanding a compelling governmental interest to justify a scheme of differential taxation. Although the taxes specifically at issue in these cases either

involved content discrimination or fell uniquely on the press or certain of its members, thereby making legislative manipulation of the tax (by raising the rate) a ready tool of censorship, the principles of those decisions extend more broadly. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990); *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n*, 789 P.2d 1312 (Okla. 1990); *McGraw-Hill, Inc. v. State Tax Comm'n*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (App. Div. 1989), *aff'd and adopted*, 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (1990); *Louisiana Life Ltd. v. McNamara*, 504 So. 2d 900, 905 (La. App. 1987). Something like strict scrutiny, if not a compelling interest test itself, is necessary to protect First Amendment interests whenever a state's taxing scheme treats different communications media differently, imposing higher tax burdens on some than on others. Of course, in some cases involving a tax generally imposed on non-speakers as well as most media, the threat of censorship may be less direct than in the case of a special tax on the press. But the threat to First Amendment values is nonetheless present whenever a state places selected media in a favored position. Rather than the mere reasonableness test applicable to taxes generally, the First Amendment demands in this context that a state justify any unequal treatment of media by a strong interest closely related to the particular form of discrimination employed.

We believe this is so for several reasons. To begin with, there is a real danger that any singling out of a medium is the product of censorial design, just as with the singling out of a group within a medium, whether by special taxation or exemption. A state imposing a differential tax burden on a particular medium may be covertly either punishing it, based on the content of communications that are characteristic of it, or rewarding the medium's more complaisant competitors. For example, a state might single out cable for harsher taxation based on hostility to its intense coverage of local political

affairs, or to its showing of potentially offensive material (such as "R"-rated movies). Discrimination among media may thus be a form of hidden content discrimination.

Moreover, even when there is no censorial motive, a tax burden placed on one class of media, but not another, has effects that are inconsistent with the First Amendment. Most directly, like any other special tax burden, it will tend to diminish the volume of the disfavored activity—here, subscriptions to cable television. Equally important, differential taxation may skew the speaker's choice of what to say. In singling out one medium for special tax burdens, the state sends a powerful signal to the media currently in favor: any medium that gives cause for offense can be punished. At the same time, the state signals the disfavored class, through the retention of a favored category, that good behavior in the future may be rewarded. In other words, a tax system that discriminates among communications media creates both carrots and sticks precisely directed to achieve an aim at odds with that of the First Amendment: a reduction in the independence and vigor of the press.[10]

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[10] *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (*"TWR"*) does not dispense with special First Amendment inquiry in the present context. (In *TWR*, the Court rejected an equal protection and First Amendment challenge to a tax law that generally denied deductibility to contributions made to lobbying organizations but allowed deduction in the case of veterans' organizations; the effect was to subsidize veterans' lobbying but not lobbying by other groups.) First, *TWR* involved only a government grant of money, not a government exaction or burden from which certain persons were exempt. In the latter situation—like this case but unlike *TWR*—the government has made the disfavored class worse off in an absolute sense than it would be in the absence of the government action. A simple subsidy does not have that effect on the unsubsidized person (like TWR, the non-veteran group) and therefore raises less constitutional concern. *See id.* at 549-50 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980) (government "need not remove [obstacles] not of its own creation")). Second, and in any event, the relative disadvantage imposed by the tax rules at

More generally, we note that *any* differential taxation brings into play a basic First Amendment concern over government's favoring of particular competitors in the marketplace for speech. *First Nat'l Bank v. Bellotti*, 435 U.S. at 785-86, 790-91; *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The principle of governmental neutrality serves a function akin to that of antitrust law in protecting competition in economic markets. That is, by preventing states from disfavoring certain communications media, the First Amendment guarantees that competition will be "uninhibited, robust, and wide-open," encouraging the free flow of information that is vital to democracy. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Without good and sufficient reason, the government should not use its powers of taxation to distort the marketplace to the advantage of some and the disadvantage of the rest.

Finally, a sharp departure from the strict scrutiny of *Minneapolis Star*—for taxes that are discriminatory but not uniquely applicable to a single speaker or medium—would make sense only if there were a marked distinction between the category of taxes at issue in *Minneapolis Star* and other taxes treating media differently. There is, however, no such bright line creating separate categories. Taxes may, in form or in effect, range from those applying to only one speaker or medium, to those applying to a defined list of speakers or media, to those applying to all media with exceptions, to those applying to some or all non-media persons or businesses, perhaps with exceptions for designated media. The First Amendment concerns identified in this Court's decisions do not suddenly dis-

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issue in *TWR* could be completely eliminated simply by establishing an affiliate organization. *Id.* at 552-53 (Blackmun, J., concurring). No such option mitigates the effect of the taxation scheme here at issue. Finally, the Court in *TWR* held that a preference for veterans, perhaps uniquely, was justified in view of their service to their country. 461 U.S. at 550-51. There is no comparable justification for the preference here. *See* Section III, *infra*.

appear at some point along this spectrum. The persistence of those concerns throughout the range of differential taxes warrants consistent application of the requirement that the government prove with particularity a countervailing interest that justifies the discrimination.[11]

C. The Arkansas tax on cable discriminates in two ways. First, cable pays a sales tax not paid by non-communications service businesses generally. The sales tax does not cover services generally: besides subscription television, only a handful of services (telephone services, hotel rooms, various repair services, printing, and tickets to entertainments) are subject to the tax. Ark. Stat. Ann. § 26-52-301(3) (1987 & Supp. 1989). Thus, the Arkansas tax lies between the extremes of the taxation spectrum running from a true generally applicable tax to a tax directed with surgical precision at a specific First Amendment speaker, such as the ones at issue in *Minneapolis Star* and *Arkansas Writers' Project*. It is, however, closer to the latter extreme.[12]

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[11] The general rule against disfavoring selected media is not called into question by *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). The Court there determined that, although newspapers generally were covered by the Fair Labor Standards Act, the FLSA validly exempted certain small newspapers. The Court did not, however, reject the sort of demanding requirement of a countervailing state interest proposed here. Indeed, the Court found the exception for small newspapers to be justified by the governmental interest in placing small newspapers "more on a parity with other small town enterprises." *Mabee*, 327 U.S. at 184. *Accord Oklahoma Press*, 327 U.S. at 194. In other words, the FLSA exception for small newspapers avoided disfavored treatment for those newspapers vis-à-vis similarly situated non-media businesses. Here, Arkansas has not justified its taxation scheme by reference to such a neutral objective.

[12] In *Oklahoma Press Publishing Co. v. Walling*, *supra*, the Court considered a burden lying closer to the "generally applicable" side of the spectrum. Because of the general applicability of the FLSA, and the congressional aim to treat small newspapers like other small businesses for certain entirely speech-neutral purposes, the

Second, the Arkansas tax scheme treats cable more onerously than other communications media. Although tangible personal property is generally subject to the gross receipts tax, sales of all newspapers and of magazines sold by subscription are specifically exempted from the tax. Ark. Stat. Ann. §§ 26-52-301(1), 26-52-401(4), (14) (1987 & Supp. 1989); Revenue Policy Statement 1988-1 (March 10, 1988), *reprinted in* Arkansas Tax Reports ¶ 69-415 (CCH) ("publications, regardless of the type or content of the publication . . . are no longer subject to Arkansas sales or use tax"). Thus the tax plainly discriminates between cable television and members of the printed press.

By imposing its gross receipts tax on cable television, while exempting not only many services but also newspapers and magazines, Arkansas has created a facially discriminatory system. Although it is not possible to ascertain the precise motives of the legislature in passing this tax, or to know the precise effect that the tax will have, this Court has made clear, in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*, that such an inquiry is unnecessary. The risks of creating a disfavored medium (cable operators) and a favored class (newspapers and magazines) are sufficient to merit imposition of the prophylactic rule here, invalidating this tax scheme unless Arkansas can show a strong, if not compelling, interest justifying the distinction. As explained below, the State cannot satisfy this heavy burden.

III. THERE IS NO STATE INTEREST IN THIS CASE SUFFICIENTLY STRONG TO JUSTIFY THE DIFFERENTIAL TAXATION OF CABLE OPERATORS

For the State's taxation scheme to withstand the proper scrutiny under the First Amendment, the State must demonstrate a strong counterbalancing interest

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Court determined that isolated exemptions for such workers as seamen and farm workers raised no constitutional difficulties. 327 U.S. at 193. *See also Minneapolis Star*, 460 U.S. at 584 n.5.

"that it cannot achieve without differential taxation." *Minneapolis Star*, 460 U.S. at 585. As we have discussed, that requirement demands that the State show not merely that cable is different in certain respects from other media, but that any differences justify the particular discriminatory taxation scheme at issue. *See* pages 11-13, *supra*. In fact, the State cannot do so, for neither the interests identified by Arkansas in this proceeding, nor interests that other courts have found sufficient to justify other types of cable regulations, come close to satisfying the State's burden.

The State's reliance on its interest in raising revenue, No. 90-38 Br. in Opp. 6, is quite plainly insufficient. That interest, of course, can be served "without differential taxation." *Minneapolis Star*, 460 U.S. at 585. The interest in revenue may explain why cable is taxed, but it does not explain why other media are not taxed.

The State has also pointed to cable's "use of the public ways and disruption of public order" as general grounds for special taxation. No. 90-38 Br. in Opp. 8. That basis, however, is not related to the particular taxation scheme at issue. The Arkansas Supreme Court itself so concluded in striking down the scheme's differential treatment of satellite services. Pet. App. 7a-8a. The same conclusion applies to the remaining discrimination (a point that the Arkansas Supreme Court simply failed to address).

It is true that cable operators ordinarily require some use of public rights-of-way to deliver their services.[13] The State, however, cannot argue that these facts justify the special tax imposed here on cable, for two reasons. First, every medium of communications makes some use

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[13] In order to establish a cable system, coaxial cable or optical fiber must be strung from utility poles or run through underground conduits; and although the poles and conduits themselves are often privately owned (by telephone companies, principally), installation and maintenance may involve temporary inconvenience to the public.

of public resources. Newspapers generally make use of public streets and sidewalks to sell their product, either through delivery persons or through mechanical newsracks.[14] Similarly, individual pamphleteers depend on public thoroughfares to reach their intended audience, while broadcasters make use of a different scarce public resource (portions of the electromagnetic spectrum). Cable's use of public resources is not so obviously greater in kind or degree as to distinguish it from other media.

Second, even assuming that the impact of cable television's use of public resources sets it apart from other media, such a distinction has no relation to the sales tax at issue here.[15] This is clear from the fact that Arkansas cable operators have already paid a franchise fee that is ostensibly tied to cable's use of public resources. Thus the Arkansas Supreme Court found, "There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way." Pet. App. 5a. In view of the prior payments required for the express purpose of providing compensation for the use of public rights-of-way, the State cannot now argue that its strong need for such compensation requires a second tax, especially a *sales* tax that is levied regardless of whether sellers actually use rights-of-way.[16]

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[14] In order to use public rights-of-way for mechanical newsracks, newspapers may be required to pay fees tied to that use and be subject to other regulations. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (invalidating newsrack permit scheme based on unfettered discretion of licensing authority). Quite plainly, however, the potential validity of such regulation in no way undermines the rule of *Minneapolis Star* barring discriminatory taxation.

[15] While it is possible that cable's particular use of public rights-of-way might provide a justification for certain types of regulation. *see Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986), the regulation must have a nexus with its justification. *See* Part I(B) and note 8, *supra*.

[16] Cable franchise fees raise distinct constitutional problems that federal courts have resolved variously. *Compare, e.g., Century*

The State has further suggested that cable television's "enjoyment of virtually unlimited access to households puts it in a different class than the press." No. 90-38 Br. in Opp. 8. This contention is, at best, mysterious. Cable has "access" to homes in precisely the same way as does the press (or other media) generally—by individual household choice, not by state grant. So, even if "pervasiveness" were a valid basis for more onerous taxation,[17] the State's observation would fail to distinguish cable television from other media.

A few courts, in considering the constitutional validity of regulations other than taxes, have found that cable is distinguishable from other media based on a theory of "natural monopoly." *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). Essen-

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Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal. 1988) (invalidating fee); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987) (same result, based on different reasoning), *with Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987) (sustaining fee), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). For present purposes, it is sufficient to recognize that the justifications that may support franchise fees are distinguishable from those that may support discriminatory sales taxes. It is unnecessary to resolve in this case the validity of either a franchise fee or the numerous requirements that municipalities may seek to impose with regard to a cable franchise.

[17] The pervasiveness of a medium may be a relevant factor in certain very narrow settings, *see FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding regulations barring broadcasting of indecent material during certain hours); *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989) (describing *Pacifica* as "an emphatically narrow holding"), but it is irrelevant to justifying differential taxation.

tially, these courts have found that the nature of the cable medium is such that only one cable system can successfully operate in a given community. But there are at least three basic difficulties with this approach. First, as a factual matter, the validity of the natural monopoly assumption is subject to genuine doubt. *NTIA Report* at 18-19. Second, mere economic market imperfections would not justify compromising First Amendment protections, as this Court made clear in discussing the problem of a "one newspaper" city. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 248, 251 (invalidating requirement of access to newspaper for candidates wishing to reply to press criticism). The monopoly position of a newspaper plainly will not justify regulation of its First Amendment activity, and there is no reason that a different rule should apply to cable. Third, even if economic-monopoly characteristics could justify some regulation of cable beyond that already applicable through the antitrust laws, it would not justify the differential tax scheme here, which does not purport to be tailored in response to such a problem.

An additional rationale for regulation is suggested by language in the Tenth Circuit's decision in *Community Communications Co.* to the effect that cable systems have "always been regulated in many respects" and that there is absent a "tradition of nearly absolute freedom from government control." 660 F.2d at 1379. This is true, but as a justification for differential taxation, it suffers from the same difficulty identified with respect to other potential justifications: it has no connection to a particular need to tax in any, let alone the present, discriminatory manner. Indeed, the logic of this view is dangerously wrong. This Court has never held that, once a medium of communication has been sufficiently regulated, any additional regulation is permissible regardless of its justifiability—and, as here, regardless of whether even the more general regulation has been constitutionally tested (as cable regulation has not widely been). The First Amend-

ment requires a strong state interest for each particular burden on First Amendment speech activity. Speech in new media cannot be regulated willy-nilly based on circular reliance on other regulatory burdens. Indeed, the Tenth Circuit in *Community Communications Co.* itself so recognized, noting that "the power to regulate is not one whit broader than the need that evokes it." *Id.* at 1379.

In pointing out the inadequacy of various proffered justifications, we do not assert that different taxation methods could never be justified by the unusual business characteristics of a particular enterprise.[18] The only such justification even hinted at in this case, however, is the Arkansas Supreme Court's suggestion that it "would be impossible" to tax broadcast television on the same terms as cable television. Pet. App. 7a. But that suggestion plainly fails, even aside from the apparent absence of record evidence to support it. The suggestion simply ignores the possibility that sales of advertising by broadcasters could be taxed at the same rate as sales of cable service or sales of tangible goods.[19] *See McGraw-*

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[18] It may be, for example, that the organization or some other commercial aspect of a particular medium would require that it be given specialized tax treatment. Thus, in *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 (Ct. App. 1987), *appeal dismissed*, 484 U.S. 1022 (1988) the court rejected a newspaper's argument that a gross receipts tax was invalid because the state used a different method to compute taxes on the motion picture industry. The court found that the motion picture industry was by nature fragmented, with the various fragments taxed as different business activities. *Id.* at 185, 237 Cal. Rptr. at 355. Thus, although the California appeals court declined to give close scrutiny to the taxation scheme before it, the scheme might well have satisfied the standard suggested here.

[19] Insofar as the Arkansas Supreme Court alluded to the difficulties of establishing a tax with equal *effects* on broadcasters, its statement is essentially a red herring. One of the tacit conclusions of *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* is that, when the dangers associated with discriminatory tax burdens are present, it is unnecessary to inquire into the actual effect of

Hill, Inc. v. State Tax Comm'n, *supra* (no compelling interest justified failure to tax broadcast advertising when such a tax applied to print media); *Oklahoma Broadcasters Ass'n*, *supra* (no compelling interest justified tax on sale of broadcast advertising that did not apply to print media). Moreover, the argument is incomplete by its own terms, for it does not even purport to justify the discriminatory favoring of newspapers and magazines, whose sales to customers could be directly taxed. In short, there is no sound basis here for any conclusion that the special organizational characteristics of different media justify the system of tax favoritism established by the State.

To repeat: the State cannot prevail simply by showing that cable is a distinct medium of communication that uses new technology. The protections of the First Amendment have never been limited in terms of the speakers' method of communication. Indeed, as this Court has recognized, even traditional media such as newspapers have changed in ways that the Framers of the First Amendment could scarcely have imagined. *See Miami Herald*, 418 U.S. at 248-49. The basic protections of the First Amendment, however, have not been diminished by such changes. Those protections require that discriminatory taxation of the media be supported by a strong justification. There is no such justification for the discriminatory tax against cable television at issue here.

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the discriminatory tax. Insofar as any two businesses are in different economic circumstances, any tax will affect them unequally. Such differences of course easily survive rational basis scrutiny, and are irrelevant under the stricter scrutiny applicable here.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be reversed in part.

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